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STAND BY COUNSEL FOR PRO SE DEFENDANT KENNETH MEDENBACH

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **KENNETH MEDENBACH,** **Defendant(s).**	**Case No. 1:15-CR-00407-MC** **DEFENDANT'S SENTENCING MEMORANDUM**

On August 1, 2016, Kenneth Medenbach comes before the Court for sentencing after his conviction by a jury of unlawful camping and unlawful occupancy in violation of 43 U.S.C. § 1733(a). Mr. Medenbach respects the jury's verdict and understands that the Court must impose a sentence. He appreciates the opportunity he had to present his opinions to the jury concerning the law and his doubts about the validity of the federal government's claims to public lands.

Understanding and accepting that there is a consequence that must flow from his conviction, Mr. Medenbach urges the court to sentence him to 30 days in custody followed by a 1 year term of supervised release.

1. The Guidelines:

Mr. Medenbach agrees generally with the calculations contained in the presentence report. He agrees that Counts 1 and 2 are grouped for guideline calculation purposes under USSG §3D1.2(d). The guideline for violations of 43 U.S.C. §1733(a) is found at USSG §2B2.3. Pursuant to USSG §2B2.3(a), the base offense level for offenses involving trespass is four. Mr. Medenbach agrees that there are no other enhancements that would apply.

An Offense Level of 4 and a Criminal History Category I results in a guideline range of 0-6 months in Zone A of the sentencing table. Probation and the government both advocate for six months in custody. The government also advocates for an excessive five year term of probation. A sentence of that length is far greater than necessary under §3553(a) given his non-violent, non-threatening conduct, and the fact that no one was denied use of this land because of his unlawful occupancy.

While Mr. Medenbach accepts that proceeding to trial is a basis to deny him a reduction of responsibility, it is still important that Mr. Medenbach did not challenge any of the operative facts at the trial. Both in his testimony and through other evidence presented, Mr. Medenbach admitted that he built the cabin on federal land. He put into evidence documents to show that he had in fact occupied the land. He did not dispute any of the government's factual assertions at trial.

This is similar to a drug conspiracy defendant who goes to trial arguing that the evidence is legally insufficient to show he joined the conspiracy without challenging the government's factual presentation. Mr. Medenbach's trial strategy was to challenge the federal government's claim of legal ownership and not anything relating to his conduct. He did not claim that he did not build the cabin or that he did not know he was on federal land.

A purely legal defense is not inconsistent with acceptance of responsibility since it can only be vindicated by going to trial. Because his primary argument was legal, the acceptance of responsibility analysis should be more nuanced. While he did not plead guilty, he did not deny any of his own conduct. So while cases support denying him an acceptance reduction, the proceedings themselves indicate no refusal to accept the government's presentation of facts in this matter. This situation therefore does not fit squarely within the guideline.

2. **The conduct in the case does not justify more than a 30 day prison sentence or more than 1 year of supervision.**

The high end of the guideline range should be reserved for those whose conduct strikes at the heart of the values that §1743 seeks to protect. Mr. Medenbach did not fill any wetlands, disturb any sensitive wildlife habitat, interrupt any logging, prevent any road building, illegally cut timber, or start any fires. His conduct put neither himself nor anyone else at risk. He was not growing marijuana or manufacturing drugs. He was not armed. He did impact any Native American sites.

The fact that it took five months for the government to cite Mr. Medenbach belies its claim that his offense merits the high end of the guideline. When the defendant has to call the police repeatedly to ask them to cite him and then drive himself to the sheriff's office so he could be cited for a crime they knew he committed, the government strains credulity to demand a sentence that should be reserved for a high priority public lands criminal.

The high end of the guideline range is for defendants whose conduct is not simply an effort to attract attention to a legitimate political issue. It should be reserved for people who wantonly destroy the public lands. It should be reserved for those defendants whose offense conduct prevents someone else from using and enjoying the public land. Not a single person testified at Mr. Medenbach's trial that he prevented them from enjoying the forest.

At trial Agent Curry of the BLM testified that Mr. Medenbach's cabin was not a typical squat on federal land. He acknowledged that Mr. Medenbach was clearly trying to communicate his dissatisfaction with the federal government through his signs. He built immediately adjacent to the road so that his ideas would be communicated to others and his impact on the forest minimal.

His conduct in this case involves little more than building a cabin that was intended to communicate political ideas protected by the First Amendment. The only structure he built was immediately adjacent to and highly visible from the road. He did not otherwise compromise anyone's use of the land or damage or destroy any natural or wild areas.

Even if he made a "claim" to the land, it was a claim which presented no actual threat to the government's title or anyone's beneficial use of the land. He was not depredating the resources of this land by relying on a bogus claim. The point was to get into court. The government knew this always and during the trial the Court so instructed the jury:

> "The United States acquired federal public lands in Oregon pursuant to an 1846 treaty with Great Britain.
>
> The United States is properly authorized under the Constitution and federal statutes to own, possess, retain, manage, acquire, and dispose of all federal public lands in Oregon as it sees fit. Defendant's legal arguments to the contrary are not valid and should be disregarded."

See Government's Special Instruction #4

In terms of evaluating the seriousness of this crime, that the government knew at all times that Mr. Medenbach could not actually claim adverse possession of this land diminishes it seriousness and justifies something closer to the low end of the range. It is not the fact of a claim that is serious, it is the pillaging of that claim that would be serious. None of that occurred here.

Mr. Medenbach's incarceration ultimately lead to the abandonment of the cabin and he is sorry for that. He repeatedly offered the government to clean the cabin up if he was out of custody. Had he been out of custody, he would have removed all trace of the cabin just as he had fixed the BLM fence he damaged when Agent Curry requested it.

It is also relevant to consider that Mr. Medenbach was not acting through avarice. There was no financial gain involved in this endeavor. In fact, he spent a great deal of his own money and invested quite a bit of time into it. The idea was to get people who saw it talking about federal land issues and to mobilize public opinion. Mr. Medenbach was not trying to claim anything for himself. As soon as he thought he might have some kind of interest in the property he quitclaimed it back to the people of Oregon. *See Quitclaim Deed* attached as *Exhibit 1.* The kind of benign mistake a pro se litigant could easily make navigating the opacity of the law.

The government's sentencing memo notes that at one point, Mr. Medenbach's claim encompassed private timber land. This was yet again a pro se litigant's good faith mistake because, of course, Mr. Medenbach is only interested in public lands. If his unenforceable claim negatively impacted the private landowner, the government certainly presented nothing to that effect at trial. It is hard to see how that makes this offense more serious.

Under these circumstances, a 30 day sentence is more than sufficient to dissuade others from ignoring camping and occupancy restrictions on federal land. It is also sufficient to deter Mr. Medenbach since he has now successfully presented and preserved for appeal all of his legal issues there is no reason for him to reoffend. In addition, a violation of conditions would result in his pretrial release in Portland to be revoked and to subject him to additional prison time in both cases. This further suggests he is unlikely to offend.

3. Mr. Medenbach's history in federal court does not justify a sentence at the high end of the guideline range.

Unexplained in the presentence report is what conduct here justifies more than a 30 day jail sentence. That Mr. Medenbach has already been in jail for six months on pretrial detention is not a relevant consideration to the appropriate sentence under 18 USC §3553(a). In large part, the report seeks to punish him for trying raise legal issues in court.

Mr. Medenbach acknowledges that he has a history of seeking relief and a forum in federal court to pursue his views about federal public land ownership and his questions about the content of the oath federal judges take. Using this history to support a high end sentence overstates the seriousness of those cases, one criminal and two civil. Perhaps most importantly, it ignores entirely that until the charges in this case and *United States v. Bundy*, Mr. Medenbach has never had any meaningful advice from an attorney about what he was doing.

At all times in these prior proceedings, Mr. Medenbach was raising what he believed were legitimate legal issues in the appropriate forum, a court:

- The inconsistency between the oath actually taken by Article III judges and the statutory requirements.

- A conflict of interest created by the judge's membership in the Oregon State Bar.

- The legitimacy of the Supreme Court's usurpation of power through *Marbury v. Madison*.

While lawyers and legal institutions may consider these issues settled, in Mr. Medenbach's eyes they are ripe for challenge and from his perspective the only place to do that is in court. Common sense informs his reading of the law. That it is may be opaque is not his fault.

20 years ago, Mr. Medenbach placed fake and harmless booby traps around his campsite in the Gifford Pinchot National Forest not because he ever intended to use them but because he misunderstood the legal requirements of adverse possession. Once he learned that adverse possession's requirement of "hostile" possession did not mean he actually had to do something hostile, he never did anything like that again. In the intervening 20 years, none of Mr. Medenbach's cases involved any threatening or violent conduct.

His interactions with the law enforcement in this case and his conduct during his trial do not reflect a violent or even an aggressive person. When the court ordered him to stop doing something, he stopped. When the court asked him to limit his testimony, he circumscribed it. He was businesslike and respectful at all times. It has been the same in his relationship with standby counsel. Mr. Medenbach has always been respectful and willing to listen. His views on the law maybe contrarian but his character is not.

4. There is no statutory authority to impose restitution for the costs of hauling away Mr. Medenbach's cabin.

The government seeks a restitution order for costs incurred cleaning up Mr. Medenbach's trailer. Mr. Medenbach objects to such an order. The government's costs relating to the investigation and prosecution are not appropriate bases for a restitution order. 18 USC §3663 does not provide any authority for the court to impose restitution of any kind for a violation of 43 USC §1743(a) and related regulations. Nor do those statutes provide any independent authority to impose an the order sought by the government.

5. Conclusion:

A sentence of six months vastly overstates the seriousness of this offense. There is also no reason why probation should be forced to supervise a misdemeanant for five years. A sentence of 30 days in jail and a 1 year term of supervised release with a condition allowing him to enter federal land only with preapproval of his probation officer is sufficient to meet the criteria of 18 USC § 3553(a).

Mr. Medenbach thanks the court for it consideration of this information.

Respectfully submitted on April 15, 2016,

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